LEONARD TEOH HOOI LEONG A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: J-05-08-2002]
10 OCTOBER 2009 C

CRIMINAL PROCEDURE: *Police Investigation - Application to revoke remand order - Lawyer remanded to assist police investigations on disappearance of his client - Whether remand justified - Whether protected by solicitor-client privilege - Whether detention an abuse of powers by police - Criminal Procedure Code, s. 117 - Evidence Act 1950, s. 126* D

EVIDENCE: *Privilege - Legal professional privilege - Lawyer remanded to assist police investigations on disappearance of his client - Whether communications between solicitor-client privileged - Whether privilege extended to case where lawyer being investigated over criminal case* E

LEGAL PROFESSION: *Professional privilege - Communications - Lawyers remanded to assist police investigations on disappearance of his client - Whether communications between lawyer and client privileged - Whether order ought to be revoked - Criminal Procedure Code, s. 117* F

A Muslim woman intending to renounce Islam to embrace Christianity engaged the appellant, a lawyer, to advise her on matters relating to the renunciation and conversion. She later signed a statutory declaration ('SD') prepared by the appellant to declare she had renounced Islam in favour of Christianity and the appellant served the duly attested SD on the Majlis Agama Islam. When she broke the news about her conversion to her family and her intention to marry a Christian ('Joseph') she was in love with, her parents confined her at home. With Joseph's assistance, she escaped from the house. A police report was lodged alleging she had been kidnapped by Joseph. In their investigations into the report, police arrested the appellant and obtained a Magistrate's order to remand him for seven days under s. 117 of the Criminal Procedure Code ('s. 117'). The day after his arrest, the appellant's lawyers moved the High Court to exercise its revisionary powers to revoke the remand order on the ground it was improperly obtained. The High Court dismissed the application, holding the Magistrate had complied with s. 117; that communications between the appellant and the woman were G H I

not privileged in the context of a criminal investigation relating to her disappearance; and that the appellant's refusal to inform police of her whereabouts made him a prime suspect. The appellant appealed to the Court of Appeal contending, *inter alia*, that the remand order was an abuse of police powers.

Held (dismissing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The High Court was right in not exercising its revisionary powers to reverse the decision of the Magistrate. It was clear in this case that the procedure under s. 117 had been complied with. The court agreed with the High Court that the appellant could not hide behind the "skirt of privilege" when he was being investigated over a criminal case. (para 20)

(2) The Magistrate had before him a letter from the investigating officer of the case setting out the need to remand the appellant as well as the police report on the alleged kidnapping and, most importantly, the investigation diary of the investigating officer. The Magistrate upon perusal of the investigation diary was satisfied there were grounds for believing the accusation against the appellant was well-founded and that it was necessary for the purpose of investigation to remand him. (para 19)

(3) On the contention that the appellant's detention was an abuse of power by the police, the case before the Magistrate was still at an investigation stage. At that stage it was not the Magistrate's duty to decide on the legality of the arrest or otherwise. The question whether the appellant was involved in the kidnapping could not be determined at that stage. (para 21)

(4) Since the question whether the appellant was involved in the kidnapping or otherwise was still under investigation, the High Court was in no position to determine that the act of the police in applying for the appellant's detention was an abuse of power by them. If the appellant felt it was an abuse of power he was at liberty to take appropriate action against the police. But it could not be done by way of revision as was done in this case. (para. 21)

Case(s) referred to:
Liaw Kwai Wah & Anor v. PP [1987] 1 CLJ 35; [1987] CLJ (Rep) 163 SC ***(refd)***
PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 CA ***(foll)***
Re The Detention of Leonard Teoh Hooi Leong [1998] 1 CLJ 857 HC ***(refd)***
Re The Detention of S Sivarasa & Ors [1997] 1 CLJ 471 HC ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 31
Criminal Procedure Code, ss. 117(2), 119, 323, 327
Evidence Act 1950, s. 126

For the appellant - Karpal Singh (Ram Karpal Singh with him); M/s Karpal Singh & Co
For the respondent - Ahmad Bache; DPP

[Appeal from High Court, Johor Bahru; Criminal Revision No: 43-1-1998]

Reported by Ashok Kumar

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal by the appellant against the decision of the High Court of Johor Bahru in dismissing the appellant's application to revise the Magistrate's remand order. The Magistrate had earlier remanded the appellant for seven days under s. 117 of the Criminal Procedure Code.

[2] We heard the appeal on 26 August 2009 and unanimously dismissed it. We now give our reasons.

[3] The High Court had adequately dealt with the background facts. (See *Re The Detention of Leonard Teoh Hooi Leong* [1998] 1 CLJ 857). Thus, in this judgment we need only refer to some of the salient facts which are essential in determining the issues submitted.

[4] The appellant is an advocate and solicitor. He was retained by Nor'aishah bte Bokhari ("Nor'aishah") to advise her on matters relating to her intended conversion to Christianity.

[5] Nor'aishah is a Muslim woman, who had fallen in love and wanted to marry Joseph Arnold Lee ("Joseph") a Chinese Christian. Sometime in October 1997, Nor'aishah had decided to renounce her Islamic faith and embraced Christianity. A statutory declaration to that effect was prepared by the appellant.

[6] On 22 October 1997, Nor'aishah affirmed the statutory declaration before a Commissioner for Oath, declaring that she had renounced Islam for Christianity.

[7] The statutory declaration was served by the appellant on the Majlis Agama Islam Wilayah Persekutuan as Nor'aishah was at the material time residing in Kuala Lumpur.

[8] On 19 November 1997, Nor'aishah broke the news about her conversion to Christianity and her love to Joseph to her parents. Her parents were shocked and distraught especially on her act of renouncing Islam for Christianity.

[9] The parents with the help of the family members brought Nor'aishah to their house in Pontian, Johor and kept her under confinement. However, on 30 December 1997, Nor'aishah with the assistance of Joseph disappeared from her parents' house.

[10] The disappearance of Nor'aishah was reported to the police *vide* Pontian Police Report No 17/78. The police report alleged that Nor'aishah had been kidnapped by her lover Joseph.

[11] The police conducted an extensive investigation over the alleged kidnapping of Nor'aishah. On 14 January 1998, the appellant was arrested. Following the arrest, the appellant was produced before a Magistrate in Pontian. The Magistrate remanded the appellant for seven days under s. 117 of the Criminal Procedure Code ("CPC").

[12] By a letter dated 15 January 1998, M/s Lee Min Choon & Co, acting for the appellant applied to the High Court Johor Bahru to exercise its revisionary powers to revoke the remand order of the Magistrate. The letter challenged the propriety of the remand order.

[13] The learned High Court judge fixed the matter for hearing on 19 January 1998. After hearing the parties, he dismissed the application. He held that the Magistrate had acted within the law and consequently there was nothing for him to revise. He gave the following reasons:

(i) As the police were investigating a kidnapping case involving Nor'aishah, the appellant's refusal to inform the police of her whereabouts made him a prime suspect.

(ii) No doubt the appellant, as an advocate and solicitor cannot be compelled to disclose legitimate communications passing directly between him and his client. But the privilege does not extend to communications made in furtherance of a fraud or criminal act. Hence, the communication between the appellant and Nor'aishah were no longer privileged as it involved a criminal investigation.

(iii) The procedure under s. 117 of the CPC had been complied with by the investigating officer as the Magistrate had before him, the police report and an investigation diary of the police.

[14] The complaint by the appellant, as advanced by his learned counsel, Mr Karpal Singh are these. The appellant cannot be a suspect just because the appellant refused to inform the whereabouts of Nor'aishah. The appellant was not obliged to divulge the information on the whereabouts of Nor'aishah, as the appellant was protected by client and solicitor privilege as provided under s. 126 of the Evidence Act 1950. Consequently Mr Karpal Singh contended that in circumstances of this case the detention of the appellant under s. 117 of the CPC was an abuse of power by the police.

[15] To support his argument, Mr Karpal Singh referred to a newspaper cutting, The Star dated 19 June 2001. It was reported that Shaikh Daud JCA, speaking for the Court of Appeal when granting the appellant's application for extension of time to file leave to appeal had said the following:

> This is not an ordinary case. It is a case of a lawyer representing his client being arrested.
>
> In this case, if the police wanted information from the counsel (regarding the whereabouts of his client, a Muslim woman who had wanted to embrace Christianity), there are other ways.
>
> To remand him is an abuse of power.

[16] With utmost respect, we are of the view that what was said by the Court of Appeal as reported above cannot be the basis in deciding this appeal. What was decided by the Court of Appeal then was in relation to the appellant's application for extension of time to file leave to appeal to the Court of Appeal. Obviously, the full facts and the real issue in this appeal were not before the Court of Appeal then. In other words, the merits of the appeal was not decided upon by the Court of Appeal.

[17] The main issue in this case is whether the detention of the appellant under s. 117 of the CPC was lawful. The working of s. 117 of the CPC is well settled. (See *Re The Detention of S Sivarasa & Ors* [1997] 1 CLJ 471; *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702). Section 117 of the CPC requires the police to produce a copy of the investigation diary before the Magistrate as prescribed by s. 119 when producing a suspect. The diary must provide a true picture of the proceedings in the investigation. If the Magistrate upon perusal of the entire diary was satisfied that there were grounds for believing that the accusation or information against the suspect was well founded and it was necessary for the purpose of the investigation to remand him, then the Magistrate would have to make the remand order. As to the length

of the remand order, it is within the discretion of the Magistrate, who has to decide based the nature and circumstances of each case provided that the detention shall not exceed fifteen days in the whole as stated in the then s. 117(2) of the CPC.

[18] In *Re The Detention of S Sivarasa & Ors (supra)* KC Vohrah J (as he then was) held that the failure to transmit to the Magistrate a copy of the entries was fatal to the application before the Magistrate as it meant that the Magistrate did not have the prescribed material to act upon her judicial enquiry whether to order for further remand. Similarly, in *PP v. Audrey Keong Mei Cheng (Supra)*, Shaikh Daud JCA held that since the police failed to produce a copy of the diary as prescribed by s. 119 of the CPC, the registrar was right to refuse to order further detention of the respondent.

[19] We endorse the above views. In the present case, there is no dispute that the Magistrate had before him a letter from ASP Puspanathan a/l L Wiresingam, the investigating officer of the case, which sets out the need to remand the appellant. The police report on the alleged kidnapping and most importantly, the investigation diary of the investigation officer was also transmitted to the Magistrate for his perusal. The Magistrate upon perusal of the investigation diary was satisfied that there were grounds for believing the accusation against the appellant was well founded and that it was necessary for the purpose of investigation to remand the appellant.

[20] It is our judgment that the learned High Court judge was right in not exercising his revisionary power, to reverse the decision of the Magistrate. It is clear in this case that the procedure under s. 117 of the CPC had been complied with. Further, we are in agreement with the learned trial judge that the appellant could not hide behind the "skirt of privilege" when he was being investigated over a criminal case.

[21] Mr Karpal contended that the detention of the appellant was an abuse of power by the police. But the case before the Magistrate was still at an investigation stage. At that stage it was not the duty of the Magistrate to decide on the legality of the arrest or otherwise. The truth that the appellant was involved in the kidnapping could not be determined at that stage. To do so, would require the Magistrate to embark on an inquiry which may in turn necessitate the calling of witnesses. That is not the purpose of s. 117 of the CPC. Since the issue on the truth whether the appellant was involved in the kidnapping or otherwise was still under investigation, the learned judge of the High Court was in no position to determine that the act of the police in

applying the appellant's detention was an abuse of power by the police. If the appellant felt that the act of the police was in fact an abuse of power, he was at liberty to take the appropriate action against the police. But we are of the view that it cannot be done by way of revision as done in this case.

[22] The revisionary powers of a High Court judge is found in s. 31 of the Courts of Judicature Act 1964 and s. 323 to s. 327 of the CPC. It is a discretionary power. The object is for High Court to be satisfied as to the correctness, legality or propriety of any finding, sentence or order recorded or passed in respect of criminal proceedings and matters in the Subordinate Courts (See *Liaw Kwai Wah & Anor v. PP* [1987] 1 CLJ 35; [1987] CLJ (Rep) 163). In the present case, the learned High Court judge had examined the record of the proceedings of the Magistrate and found that the Magistrate had acted within the law when remanding the appellant for seven days under s. 117 of the CPC. He chose not to interfere with the Magistrate's order or decision. We too chose not to interfere with the High Court's order. We have no reasons to do so.

[23] For the afore said reasons, we dismissed the appeal.